

HAZEL ANNA SMITH ET AL.

IBLA 82-1177

Decided August 23, 1984

Appeal from decision of the Nevada State Director, Bureau of Land Management, dismissing protest against noncompetitive land sale (N-32355).

Reversed.

1. Federal Land Policy and Management Act of 1976: Sales  
The existence of a mining claim precludes the sale of the land under sec. 203 of the Federal Land Policy and Management Act of 1976 until the claim is found to be invalid or otherwise extinguished.
2. Federal Land Policy and Management Act of 1976: Sales  
Historic but unauthorized use of the land can be considered when determining whether public lands can be offered for sale utilizing the modified competitive bidding procedures outlined in 43 CFR 2711.3-2(a).
3. Federal Land Policy and Management Act of 1976: Sales  
In a noncompetitive sale of land under the provisions of sec. 203(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713(a) (1982), to other than a governmental entity, it must be demonstrated that the tract identified for sale is an integral part of a project of public importance or that there is a need to recognize a previous authorized use.

APPEARANCES: John S. Kirkham, Esq., Salt Lake City, Utah, for appellants.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

This appeal is taken from a decision dated June 28, 1982, by the Nevada State Director, Nevada Bureau of Land Management (BLM), denying appellants' protest of proposed noncompetitive land sale N-32355 in West Wendover, Nevada. 1/

---

1/ As named in the statement of reasons, the appellants are Hazel Anna Smith; W. F. Smith Testamentary Trust; State Line Hotel, Inc.; and Jim's Enterprises, Inc.

The land in question is a portion of lot 17, sec. 15, T. 33 N., R. 70 E., Mount Diablo meridian, Elko County, Nevada, totaling approximately 6.85 acres. <sup>2/</sup> This tract is a portion of an unpatented placer mining claim located in 1939 by Fred D. West (West). Over half of West's mining claim, including his original discovery point, has been patented to third parties via private exchanges. The tract is located in an urban area and is crossed by various road and utility rights-of-way. The BLM land report finds the land suitable for sale and recommends that the tract be sold noncompetitively to the heirs of West, who died in 1981.

BLM initiated a noncompetitive sale of the tract to West pursuant to section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1713 (1982) and 43 CFR 2711.3(b). West died on May 5, 1981, and his heirs have expressed a continuing desire to acquire the land. Notice of BLM's sale was published in the Federal Register, 47 FR 11775 (Mar. 11, 1982). That notice, after describing the tract, states in part as follows:

The above-described land, comprising 6.85 acres, is being offered by direct sale to the heirs of Fred D. West at fair market value. Disposition will assure equitable consideration to a historical user and the owner of improvements on the land.

The proposed sale is consistent with the Bureau's Planning System. Public interest will be served, as the sale will assist the area's economy by satisfying local government and private needs for land identified for disposal. The tract location and its characteristics make it difficult to manage as part of the public lands, and it is not suitable for management by another Federal department or agency. The land will not be offered for sale until 60 days after the date of this notice.

The notice also listed rights-of-way and other reservations which would attach upon issuance of patent.

By letter dated April 20, 1982, appellants wrote the State Director urging that the tract in question be offered for competitive sale pursuant to section 203 of FLPMA, supra, and 43 CFR 2711.3-1. On June 28, 1982, the State Director issued a decision commenting on appellants' arguments and concluding that the best interest of the public would be served by a direct sale. Appellants appealed to this Board from the State Director's decision.

Originally, West applied for mineral patent on April 26, 1979. However, a field examination made on December 2, 1980, determined that there had been no discovery of valuable minerals and the land did not qualify for a mineral patent. A State Director's memorandum, dated August 28, 1981, states in part:

Examination of the West Wendover No. 1 indicates that the land is nonmineral in character and that a valid discovery of sand and gravel does not exist on the claim. With these conclusions, the Bureau would normally initiate contest proceedings to

---

<sup>2/</sup> BLM's appraisal report lists a figure of 6.92 acres.

reject the application and declare the claim null and void. Instead, out of consideration for Mr. West's age and health and because so much of the claim has been patented to others, we decided to offer him the opportunity to purchase the land by direct sale at fair market value.

\* \* \* \* \*

In summary the West mining claim has been diminished as a result of two government actions. What is remaining appears to be non-mineral in character. Therefore, in light of the two government actions we believed a direct sale to Mr. West was a reasonable approach made with the best interests in mind of all concerned.

The State Director's decision, which is the basis for the appeal, was made in reliance upon section 203(f) of FLPMA, 43 U.S.C. § 1713(f) (1982), 3/ and the applicable sales regulations at 43 CFR Subpart 2710. The decision specifically responded to each comment and argument against the sale advanced in appellants' protest letter of April 20, 1982.

Appellants contend that there are not sufficient equitable considerations for selling privately to West's heirs and that for this reason the sale would constitute an abuse of administrative discretion.

Section 203(a) of FLPMA, 43 U.S.C. § 1713(a) (1982), provides as follows:

§ 1713. Sales of public land tracts

(a) Criteria for disposal; excepted lands

A tract of the public lands (except land in units of the National Wilderness Preservation System, National Wild and Scenic Rivers Systems, and National System of Trails) may be sold under

3/ 43 U.S.C. § 1713(f) (1982) provides:

"(f) Competitive bidding requirements

"Sales of public lands under this section shall be conducted under competitive bidding procedures to be established by the Secretary. However, where the Secretary determines it necessary and proper in order (1) to assure equitable distribution among purchasers of lands, or (2) to recognize equitable considerations or public policies, including but not limited to, a preference to users, he may sell those lands with modified competitive bidding or without competitive bidding. In recognizing public policies, the Secretary shall give consideration to the following potential purchasers:

"(1) the State in which the land is located;

"(2) the local government entities in such State which are in the vicinity of the land;

"(3) adjoining landowners;

"(4) individuals; and

"(5) any other person."

this Act where, as a result of land use planning required under section 1712 of this title, the Secretary determines that the sale of such tract meets the following disposal criteria;

(1) such tract because of its location or other characteristics is difficult and uneconomic to manage as part of the public lands, and is not suitable for management by another Federal department or agency; or

(2) such tract was acquired for a specific purpose and the tract is no longer required for that or any other Federal purpose; or

(3) disposal of such tract will serve important public objectives, including but not limited to, expansion of communities and economic development, which cannot be achieved prudently or feasibly on land other than public land and which outweigh other public objectives and values, including, but not limited to, recreation and scenic values, which would be served by maintaining such tract in Federal ownership.

The parties agree and the record demonstrates that the proposed sale meets the statutory requirements set out in paragraphs (a)(1) and (a)(3) of section 1713, paragraph (a)(2) being inapplicable. Therefore, the questions remaining are whether the land is presently available for sale and whether a noncompetitive sale is proper under the factual circumstances of this case.

[1] As stated previously, the land is subject to an unpatented placer mining claim located by Fred West in 1939. While the mineral report concluded that the mining claim is not valid because it is not supported by a discovery, the Department may not, consistent with due process, declare a claim invalid on the basis of lack of discovery without first affording a claimant a hearing at which he is given an opportunity to demonstrate the existence of a discovery. A recent Instruction Memorandum issued by the Director, BLM, states:

A mining claim of record under Section 314 of FLPMA prevents an exchange or sale. Use the BLM mining claim files to delete such acreage from sale and exchange. A mining claim of record in conflict with a proposed sale or exchange may be challenged for the purposes of determining validity, but only after the State Director has determined that public interest will be well served by the exchange or sale.

Instruction Memorandum No. 84-487 (May 11, 1984). As there has been a determination that the public interest would be served by the disposition of this land, the claim could be contested, and, if found invalid, it would no longer impede a sale. <sup>4/</sup> Therefore, unless and until the claim is abandoned (by

---

<sup>4/</sup> It is assumed that if a private sale could be held, the claimants would abandon the claim in order to take advantage of the sale. On the other hand, if anything but a private sale were conducted, sale could not take place until the claim is determined to be invalid.

agreement or action of the claimants), or declared to be invalid in a contest proceeding no public or modified public sale can take place.

[2] In order to answer the second question, the equities contemplated by 43 U.S.C. § 1713(f) (1982) should be examined. A review of the regulations subsequently adopted sheds some light on the matter. These regulations can be found at 43 CFR Subpart 2710. The applicable provisions covering sales by other than competitive bidding are found at 43 CFR 2711.3-2). Subpart (a) of this section outlines the equitable considerations for a modified public sale procedure and states in relevant part:

(a) Public lands may be offered for sale utilizing modified competitive bidding procedures when the authorized officer determines it is necessary in order to \* \* \* recognize equitable considerations or public policies.

(1) Modified competitive bidding includes, but is not limited to:

(i) Offering to designated bidders the right to meet the highest bid. Refusal or failure to meet the highest bid shall constitute a waiver of such bidding provisions; or

(ii) A limitation of persons permitted to bid on a specific tract of land offered for sale.

(2) Factors that shall be considered in determining when modified competitive bidding procedures shall be used, include but are not limited to: Needs of \* \* \* historical users, and other needs for the tract.

As will be seen, the equities present in this case are such that if the State Director, BLM, so determined, a modified public sale could be held in recognition of the historic use of the land by West.

[3] Subpart (b) of 43 CFR 2711.3-2 outlines the equitable considerations to be considered for a noncompetitive sale. The pertinent language of this subpart states:

(b) Noncompetitive sales may be utilized when, in the opinion of the authorized officer the public interest would best be served by a direct sale. Examples include, but are not limited to:

(1) A tract identified for transfer to State or local government:

(2) A tract identified for sale that is an integral part of a project of public importance and speculative bidding would jeopardize the timely completion and economic viability of the project; or

(3) There is a need to recognize authorized use, for example, when an existing business would be threatened if the tract were purchased by other than the authorized user.

The tract is not to be transferred to a state or local government and, thus, subparagraph (i) of 43 CFR 2711.3-2(a)(1) clearly does not apply. Likewise, there is no evidence that the tract is an integral part of a project of public importance. The remaining provision deals with use of the land which may justify a noncompetitive sale. In order for the sale to qualify as a noncompetitive sale the use must not just be historic. It must also be authorized. Mining was an authorized use of the land at the time that the claim was located in 1939. However, the record also clearly demonstrates that since 1942 the land had been used for residential purposes. The appraisal report included the following findings with respect to improvements on the land:

At the time of inspection there were three trailer houses situated on the subject property. One has been made a permanent structure and was the residence of Fred West, mining claimant. The other two are considered personal property. The permanent trailer does not contribute to the property's highest and best use and is considered to have no contributory value.

(Appraisal Report at 15). If certain factors are present the use of the unpatented mining claim for residential purpose may not be considered to be an "unauthorized" use. A claim located prior to the passage of the Surface Resources Act, 43 U.S.C. § 612(a) (1982), can be used for surface occupancy if the claim is supported by a discovery which was in existence in 1955 and continues to be in existence. However, the lack of a discovery on the date of passage of the Surface Resources Act, or a failure to maintain this discovery would necessarily result in the loss of the right of surface occupancy for purposes other than mining. In such case, residential occupancy would no longer be "authorized." West's location of the claim in 1939 and the continued maintenance of this claim to the present could afford the basis for an authorized surface use for residential purposes. The record discloses, however, that the mineral examiner found no discovery on the claim when he conducted a mineral examination on October 25, 1982. This being the case there is a serious question regarding the "authorized" use of the land which could only be resolved through a mineral contest proceeding.

As noted above, there is also a serious question as to whether the use by West at the time of the application for a noncompetitive sale can be considered to be an authorized use and there is no existing business which would be threatened if the land were purchased by another. The equities do not justify a nonpublic sale without the resolution of the question of the existence of a valid discovery in 1955 and at the time of the application of West.

Appellants contend that the rights of Fred West's heirs in the parcel are no greater than those of the general public and that Fred West was not prejudiced in any way by the issuance of patents to others of portions of his claim. These arguments ignore West's long term historic use of the property. In the absence of further proof that the claim was supported by a discovery

in 1955 and that the claim was supported by a discovery at the time of application for the sale, West's use cannot be considered to be "authorized," and West's heirs cannot qualify for a noncompetitive sale. However, West's historic use of the land, even though it be unauthorized, does qualify his heirs for consideration under the regulatory provisions allowing a modified public sale.

Appellants point to the possibility that the heirs might immediately sell the lands and "receive the benefit of the 'competition' to establish the 'fair market value' of the parcel." A modified public sale would overcome these concerns.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

R. W. Mullen  
Administrative Judge

We concur:

James L. Burski  
Administrative Judge

Gail M. Frazier  
Administrative Judge.

